

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 MONIQUE DA SILVA MOORE, et al.,
4 Plaintiffs,

5 v. 11 Civ. 1279 (ALC)

6 PUBLICIS GROUPE SA and
7 MSLGROUP,

Defendants.

Conference

8 -----x

New York, N.Y.
July 9, 2012
3:30 p.m.

11 Before:

12 HON. ANDREW J. PECK

Magistrate Judge

14 APPEARANCES

16 SANFORD WITTELS & HEISLER LLP
17 Attorneys for Plaintiffs
18 BY: STEVEN L. WITTELS
SIHAM NURHUSSEIN

19 JACKSON LEWIS LLP
20 Attorneys for Defendant MSLGroup
21 BY: JEFFREY W. BRECHER

22 MORGAN LEWIS & BOCKIUS LLP
23 Attorneys for Defendant Publicis Groupe
24 BY: PAUL C. EVANS
25

1 (Case called)

2 THE COURT: I have read your submissions on the
3 remaining issues on jurisdictional discovery. Let's take them
4 one at a time. Let's let Mr. Wittels take the starting point.

5 MR. WITTELS: Good afternoon, your Honor. If the
6 Court please, Ms. Nurhussein will take this.

7 THE COURT: Sure.

8 MS. NURHUSSEIN: Thank you, your Honor.

9 We conferred with defense counsel. We were able to
10 reach agreement on several categories of documents. As both we
11 and defense counsel noted in our respective letters, there are
12 really four main areas of dispute or four main outstanding
13 issues. I'll start with the first category, which is
14 Publicis's role in the reorganization, Publicis and Maurice
15 Levy, who is the CEO of Publicis. Throughout the discovery
16 process Publicis's counsel repeatedly represented to us and the
17 Court that Mr. Levy --

18 THE COURT: Short-change the history and get to what
19 it is you want them to do now and what they don't want to do,
20 and we'll go from there.

21 MS. NURHUSSEIN: What we would like them to do is
22 search for the discoverable information in Mr. Levy's documents
23 relating to the organization.

24 THE COURT: Paper or email or both?

25 MS. NURHUSSEIN: Both.

1 THE COURT: Mr. Evans?

2 MR. EVANS: Your Honor, we have conferred with Mr.
3 Levy and we have retrieved all responsive hardcopy documents.
4 I think the issue where we disagree with plaintiffs' counsel is
5 whether or not we should need to search the email accounts of
6 Mr. Levy. Publicis has already admitted that Mr. Levy
7 participated in the decision to create MSLGroup with Olivier
8 Fleurot, the CEO of MSLGroup. We have produced the PowerPoint
9 that was presented to Publicis's P12 on the subject.

10 After the last conference and producing budgeting
11 documents referenced at the conference, there are comments
12 contained within that production that depict the correspondence
13 from MSLGroup, from Olivier Fleurot, to Publicis on the
14 subject. So we think that the plaintiffs have that which they
15 need to make their argument with respect to jurisdiction. To
16 have to search the email account of the CEO of Publicis Groupe,
17 who sits in France and is subject to the French blocking laws,
18 is too extreme at this stage.

19 THE COURT: Do you have any idea what the volume is,
20 what language it's in, and whether there are counterparts to
21 the emails in the United States?

22 MR. EVANS: There won't be any counterparts in the
23 United States that are Publicis Groupe documents, since there
24 are no Publicis Groupe employees here.

25 THE COURT: I wasn't clear perhaps. The question was

1 if Mr. Levy was emailing to, and I'll use fictitious names,
2 John Watson at MSL New York, presumably there are copies in the
3 Watson email file at MSL. That just changes the burden from
4 Publicis to MSL, but it avoids the French blocking statute
5 unless there is a binding corporate rule or something else that
6 makes the material already in New York part of the French
7 privacy regime.

8 MR. EVANS: The creation of MSLGroup generally
9 happened between Olivier Fleurot, who is in France, and Maurice
10 Levy, who was in France, so emails would be at the French level
11 in any event. In terms of the size of their account, we do not
12 know. We did pull as part of our leading up this conference
13 accounts of Jean-Michel Etienne and Mathias Emmerich, who is
14 the general secretary. We have some corrupted files, but of
15 the files we have been able to pull, we have 350,000 emails, or
16 documents.

17 THE COURT: What is it that you want to argue?
18 Presumably you have the admission that Mr. Levy of Publicis
19 from France participated in creating MSL. Either that is
20 sufficient by itself along with the other evidence you have or
21 it isn't. What difference does it make what the details are
22 provided that when you make an argument, they don't then come
23 back and try to shoot holes in it?

24 MS. NURHUSSEIN: Your Honor, we certainly can make
25 that argument. But under the jurisdictional analysis of

1 C.P.L.R. 301, one of the factors to look at is the actual
2 degree and nature of the parent's involvement, not just the
3 fact that the parent had some involvement in a restructuring
4 but the exact nature and degree.

5 THE COURT: Is that what the Publicis 30(b)(6) witness
6 testified to?

7 MS. NURHUSSEIN: Your Honor, if I recall correctly,
8 the 30(b)(6) witness said that Mr. Levy was essentially the
9 person who would have knowledge and who was behind the
10 reorganization.

11 THE COURT: That's not the question per se. The
12 question is did the witness say, we were intimately involved,
13 we were not involved? The wording matters.

14 MS. NURHUSSEIN: Your Honor, if I recall correctly, I
15 think the 30(b)(6) witness provided some conflicting testimony
16 where on the one hand he said that Mr. Levy was behind the
17 reorganization and at the same time he said that MSL was the
18 one that implemented it. I think in this particular case --

19 THE COURT: That is not a conflict as you have just
20 described it. Keep going.

21 MS. NURHUSSEIN: I think in this particular case
22 having some written discovery that actually reflects the extent
23 to which Publicis was driving the process, the extent to which
24 Publicis created the network for its own benefit, all of those
25 are things that courts within the circuit say bear upon the 301

analysis and whether corporate formality is observed during the restructuring process.

If I could also respond to when Mr. Evans pointed out that they were searching Mr. Etienne's and Mr. Emmerich's emails. My understanding is that those emails relate primarily to the requests for raise exceptions to the salary and hiring freeze and not necessarily to the reorganization.

MR. EVANS: If I may respond, your Honor. The test for jurisdiction deals with the nature and degree and involvement of a parent in the operations of the entities that it owns. It would have to do with how they operate, not how they are created. The cases cited by plaintiffs with respect to restructurings were about restructurings of operations that existed.

Publicis has admitted that it was involved in the creation of MSLGroup. The 30(b)(6) deposition witness testified in response to a question from Mr. Wittels that Maurice Levy, the Publicis Groupe chairman, initiated the organizational restructuring of the holding company's PR, corporate communications, and events practices in the hope of creating a premier PR network with MSL.

He also testified in response to another question, "What the group and Mr. Levy has decided to do is to create a big PR network which would have significant ranking in the workplace on a worldwide basis. I consider this as part of the

1 strategy of the group to use as best we can its access. But
2 the decision is just to constitute a big PR network." He went
3 on to say the implementation of that strategy was then
4 undertaken by Mr. Fleurot.

5 THE COURT: My inclination, since we are already
6 taking the briefing schedule and have held it much longer than
7 I would have liked, is to say I think you have enough. Make
8 your argument at the time under Judge Carter's schedule when we
9 finish the rest of the jurisdictional discovery.

10 If you feel you get sandbagged by Publicis when they
11 put in their reply papers, and in order to encourage them not
12 to, I will seriously consider letting you have further
13 discovery and a surreply in the event that you argue that
14 Publicis created MSL and they argue not a legal argument but
15 come up with facts that are different from what the 30(b)(6)
16 witness testified to.

17 MR. WITTELS: May I speak just briefly?

18 THE COURT: I generally don't like tag-teaming. If
19 you feel you must, you must.

20 MR. WITTELS: I don't want to tag-team.

21 MS. NURHUSSEIN: Your Honor, the one thing we wanted
22 to clarify is that there doesn't appear to be a dispute that
23 Publicis was behind the creation of MSLGroup, at least now
24 there doesn't appear to be. Before, there was a dispute as to
25 that. What we are concerned about is, again, just that

Publicis is withholding documents that would allow us to test their argument that --

THE COURT: Their argument that they created it?

MS. NURHUSSEIN: No. The argument that they may have created it but really all the actual process and the implementation of the restructuring was driven by MSL.

THE COURT: There is no evidence that Mr. Levy was involved in that implementation. You had the 30(b)(6) witness who was testifying about implementation from Publicis's point of view. Unless you're telling me that that person committed perjury, it seems to me you have the ammunition you need.

I understand your argument. Again, you're going to argue that they implemented it, that they created it. Depending on what the defendants say in their reply papers, if necessary, I will cause them to review Mr. Levy's emails at that point. I frankly don't think that is going to happen. I think you're going to get what you need by making the arguments you make in your opposition papers.

Now let's move on. The next one is Re:Sources.

MS. NURHUSSEIN: Yes, your Honor.

THE COURT: On that, let me tell you where I think I'm coming from, and then you can argue from there. It might make sense, since they are in New York, to have a 30(b)(6) witness from Re:Sources testify as to their relationship to Publicis in France and MSL in New York and connect the dots that way. That

1 is also probably the fastest.

2 Whether that requires them to be subpoenaed or
3 whether, between Publicis and MSL, you will accept a deposition
4 notice on their behalf or accept the subpoena as counsel for
5 Re:Sources so that is not held against you in any way, that's
6 what I'm leaning towards. I'll hear from whichever side least
7 likes that leaning to argue differently.

8 MR. EVANS: Perhaps that's me. Your Honor, we would
9 take the position that the plaintiffs have had months of
10 discovery to raise issues with respect to the shared services
11 model undertaken into the United States. They have known that
12 Re:Sources was a distinct legal entity. They took the
13 deposition of our 30(b)(6), witness who testified about the
14 extent of Publicis's involvement in the provision of shared
15 services.

16 We have consistently from the beginning explained that
17 process and explained and produced documents that reflect the
18 limited times in which Publicis in France actually gets
19 involved in the shared services offered by Re:Sources in the
20 United States to other entities within the United States. At
21 this stage of the litigation, we are already extending the
22 discovery schedule. It's going to result in additional delay
23 of the process. It's unnecessary and it's untimely.

24 THE COURT: Ms. Nurhussein?

25 MS. NURHUSSEIN: Your Honor, we don't know how

1 defendants can make an argument about timeliness given that we
2 served the requests in October and they didn't produced the
3 documents until March at the earliest.

4 THE COURT: The key question is the time between March
5 and now.

6 MS. NURHUSSEIN: Yes, your Honor. We have followed up
7 repeatedly about our product discovery requests. My
8 understanding from the last conference was there were a lot of
9 questions relating to non-MSL subsidiaries that your Honor
10 suggested we get through the 30(b)(6) deposition. Your Honor
11 also noted at the last conference that if Publicis were to walk
12 away from its policies, we would potentially be entitled to
13 additional discovery, which is exactly what happened with
14 respect to the Re:Sources manual.

15 Dong Tso Chen, the 30(b)(6) witness, said that he
16 didn't know whether the manual was implemented with respect to
17 MSL, and he repeatedly distanced himself from the policy,
18 calling it best practices but not something that the
19 subsidiaries necessarily followed.

20 We would be amenable to doing the 30(b)(6) deposition
21 of a Re:Sources person. To my understanding, Publicis counsel
22 John Spitzig I believe is also affiliated with Re:Sources. So
23 I don't see what the difficulty would be there. I think that
24 possibly would be the quickest and cleanest way to get the
25 information with minimal burden to Publicis.

1 MR. EVANS: As an initial matter, we never described
2 the shared services model policy that applied from Publicis to
3 any entity, including Re:Sources or MSLGroup. We described the
4 Janus book as the relevant policies, and the witness confirmed
5 during the deposition what we said all along, which is that
6 those are the policies and they are enforced.

7 With respect to Re:Sources, I don't represent
8 Re:Sources, so I can't accept service of a subpoena or agree to
9 allow anyone at Re:Sources to be deposed. As I said before, I
10 think the request is untimely. I think the plaintiffs had
11 ample opportunity to take discovery on jurisdiction from any
12 number of sources and that they chose to take the route they
13 did and they should live with it.

14 THE COURT: As to Re:Sources, I guess you're going to
15 have to serve a subpoena limited to a half-day deposition and
16 limited solely to any connection between Publicis and
17 Re:Sources on behalf of Publicis providing services for MSL.
18 Nothing about Re:Sources and other New York or any other
19 company except MSL and Publicis.

20 You will have to describe in whatever detail what it
21 is you want the 30(b)(6) witness to be prepared on. If there
22 are fights about that, let's try get whoever is going to be
23 counsel for Re:Sources in quickly. I certainly want this
24 discovery period to end so that the briefing can be finalized.
25 That's the Court's ruling.

1 Once you talk to Re:Sources, you may find that as an
2 affiliate company to your two companies -- by your two, I'm
3 referring to Publicis and MSL -- that they will authorize
4 somebody to accept that subpoena to get the process moving,
5 whether that is Mr. Evans, Mr. Brecher, some other attorney in
6 the corporate hierarchy. It's not very hard to serve a
7 subpoena on a corporation anyway, but I certainly would like to
8 see that deposition done by the end of this month, if not
9 sooner.

10 Next, the deficiencies, alleged deficiencies, in Mr.
11 Etienne's knowledge.

12 MR. WITTELS: Your Honor, on this point, we ask that
13 this question be deferred for the following reason and that
14 there not be a ruling on this today. Given that there is now
15 an extension on the briefing schedule for us to put in our
16 papers asking the defendants to produce more documents that
17 have been targeted to jurisdictional questions, we would like
18 to see what they produce to see if in fact we want to follow up
19 with that deposition. It may well also be that some of the
20 issues that we wanted to ask him about will be covered by the
21 30(b)(6) topics that are addressed to Re:Sources.

22 THE COURT: Other than item 12 on the list -- and I'm
23 working off of your letter, Mr. Wittels, your firm's letter,
24 whoever signed it -- it seems that everything else, 12, 13, 14
25 have to do with Re:Sources and I assume would be eliminated by

1 that. There is a lot of other material.

2 I'm happy to defer it. But because time is on
3 nobody's side, particularly the Court's, I want to make sure
4 that if we are coming back to this, it's not going to result in
5 a delay because one of you is unavailable. I tried to get you
6 in last week, and somebody asked that that conference be moved
7 to today. I understand last week was a semi-holiday, although
8 I was working. But I don't want to lose more time.

9 If you're confident that this is likely to go away,
10 and by looking at a lot of it I think it is likely to go away,
11 either because it's covered by Re:Sources or whatever, then
12 that's fine. But if not, even though it takes up my time, I
13 don't want to risk that you want to come back at a time when
14 I'm on trial and then we lose another week or two.

15 MR. WITTELS: May I confer with Ms. Nurhussein?

16 THE COURT: Sure.

17 MR. WITTELS: Your Honor, we are very sensitive to,
18 obviously, not having to request again a time shift given the
19 calendar and wanting to get this motion briefed. What we would
20 propose is if we do come back, we think it could be done with a
21 Skype deposition pretty quickly, with a limited time, an hour
22 or two, to follow up on anything that is not covered by the
23 documents they produce.

24 THE COURT: You run the risk that once we hit August,
25 if we hit August, it is not unusual for Europe to shut down.

1 If everything else is ready and we have deferred this and a
2 problem arises, that's the risk you will have to take, or we
3 can go forward now. There are only about five topics once you
4 get rid of Re:Sources.

5 MR. WITTELS: They are limited on the first page, 6
6 and 7, to the --

7 THE COURT: Are we arguing them or not? You can defer
8 it. You just risk with deferral that there may not be the
9 ability to deal with it in a timely fashion. And I'm not going
10 to hold up the briefing in this forever. Or we can do it now.
11 It's up to you.

12 MR. WITTELS: Since we are here, your Honor, perhaps
13 we should go through them.

14 THE COURT: That's fine.

15 MR. WITTELS: If they get us the documents timely,
16 within the near future, we will have time to decide whether we
17 want to depose him. If not, we can notice him up before the
18 end of the month.

19 THE COURT: OK. Location of the P12 meetings, is that
20 something that is now going to be covered by some document
21 production, if I'm remembering right, if those meetings
22 occurred in New York?

23 MR. EVANS: There was testimony that there were some
24 meetings that took place in New York and others that did not.
25 The witness didn't know the exact dates of the meetings that

1 were in New York.

2 THE COURT: Remind me, what is P12 meetings?

3 MR. EVANS: It is an executive committee over Publicis
4 Groupe.

5 THE COURT: Perhaps the easiest thing to do is to come
6 up with a list of which of those meetings were in New York and
7 when.

8 MR. EVANS: We can do that from 2008 forward, which is
9 the time period we have agreed with the plaintiffs for the
10 other production.

11 THE COURT: Mr. Wittels and Ms. Nurhussein, does that
12 work?

13 MR. WITTELS: One moment. That would be fine, your
14 Honor.

15 THE COURT: Good. We have agreement. Miracle of
16 miracles.

17 Next is item 4, whether the boards are controlled by
18 Publicis. If my recollection is correct, and I read these
19 letters a long time ago, since you put the conference off, but
20 there is going to be the identity of the members of the
21 Publicis and MSL boards. Yes?

22 MR. EVANS: It's been produced, your Honor.

23 THE COURT: Then I don't understand what the issue is
24 on this. You know who they are. Anything else sounds like
25 argument.

1 MR. WITTELS: We have the names. The question is
2 control. In terms of direction and in terms of how the board
3 would operate, we don't have.

4 THE COURT: That you have in the Janus book. It seems
5 to me you're looking for argument here. You also can Google or
6 do independent research as to whether any of these people work
7 for Publicis or are, quote-unquote, outside independent
8 directors. I'm denying any further deposition on that subject.

9 The next one, which is item 5, seems to be the same
10 thing.

11 MR. WITTELS: In that one, from our quote, you can see
12 the witness is stepping away from the policy, not familiar with
13 the system, slightly different from how others are.

14 THE COURT: I'm not sure how that establishes
15 jurisdiction over Publicis. If anything, it sounds like MSL is
16 more independent. You're going to have the identity of the
17 board. That's enough. Next.

18 The next one is 7, about the RIF, reduction in force.

19 MR. WITTELS: He obviously could not answer the
20 germane questions.

21 THE COURT: The germane question is jurisdiction over
22 Publicis. That's the overarching question. I'm not sure
23 whether or not MSL is part of the reduction in force during the
24 hiring freeze period. How does that tie back to Publicis one
25 way or the other?

1 MR. WITTELS: We know it was initiated from Publicis,
2 but we don't know the extent of it, I guess. That's the issue.

3 THE COURT: The extent of it is not relevant
4 jurisdictionally. Whether they fired one person in the RIF or
5 50, it's either or not the fact that Publicis, quote-unquote,
6 ordered it, if that's what the testimony is. You're not
7 helping me here. The request is denied.

8 MR. WITTELS: Sorry. The question, though, was
9 whether MSL was part of the reduction in force that took place.

10 THE COURT: Is that a yes-or-no question? Do you want
11 a yes-or-no interrogatory answer to that?

12 MR. WITTELS: Yes.

13 THE COURT: Any problem with answering that, either
14 yes, no, or however many sentences it takes?

15 MR. EVANS: The problem with answering the question is
16 that it mischaracterizes the testimony of the witness. The
17 witness testified at length about the hiring freeze and salary
18 freeze and Publicis's role in that. He was then shown a
19 document that was not a part of any 30(b)(6) notice, where the
20 reduction in Publicis Groupe subsidiary employees worldwide was
21 described as having been a reduction in force, meaning people
22 left and people were not hired.

23 He was asked a question that is outside the scope of
24 the case. Even the use of the term "reduction in force," while
25 it was in the press release that he was shown, really isn't

1 accurate. So it's a tough question to answer yes or no, your
2 Honor. I could put that in an interrogatory response.

3 THE COURT: Answer it in whatever way is appropriate.
4 Just answer it.

5 The rest of these all have to do with Re:Sources. So
6 I think we're done with this. Yes, Mr. Wittels?

7 MR. WITTELS: I think maybe 15 was covered.

8 THE COURT: What difference does it make?

9 MR. WITTELS: I think the benefit plans is a question
10 that goes to jurisdiction, whether they are using the same
11 plans, whether they control how the benefit plans are set up
12 and operate with respect to the higher-up executive personnel.
13 They didn't have any knowledge of that.

14 THE COURT: As I read the answer he gave, the 401(k)
15 is handled by the U.S., not by Publicis, looking at their
16 answer and your chart repeating their answer. I think it is
17 more a question that you don't like the answer than that they
18 didn't know the answer.

19 MR. WITTELS: That was on medical benefits, your
20 Honor.

21 THE COURT: That says 401(k). I'll read it.

22 "Q. Does Publicis Groupe include any of the subsidiaries in its
23 401(k) retirement programs?

24 "A. This is a matter which is handled in the U.S. I'm not
25 familiar with it." Etienne deposition at 166, lines either 15

1 to 19 or 24 to the next page, depending on the way each of you
2 have quoted it.

3 MR. WITTELS: Can we have that, your Honor? Given his
4 unfamiliarity and given that it was a topic, can we have an
5 interrogatory response on that?

6 THE COURT: No. First of all, where is it a topic in
7 your 30(b)(6) notice? And why is the answer any different than
8 what he just told you? It is not done by France. You make an
9 assumption in the way you ask the questions, and when you are
10 told that that assumption is incorrect, you said the witness
11 didn't know anything. Based on the information you have both
12 given me, the request is denied.

13 Let's go to the privileged and redaction logs. I
14 can't wait. Mr. Evans, do you have anything to say prefatory
15 on that?

16 MR. EVANS: As an initial matter, your Honor, and it
17 is set forth in our papers, plaintiffs had our privileged an
18 redaction logs at the beginning of May. We have been before
19 this Court since that time. They never raised the issue. They
20 raised it the day before the end of the discovery. I view it
21 as a kitchen sink attempt to put forth a litany of all their
22 concerns at the last minute. I think it is untimely and should
23 be denied on that basis alone.

24 THE COURT: Mr. Wittels and Ms. Nurhussein?

25 MS. NURHUSSEIN: Your Honor, if we are talking about

1 timeliness, I would point out --

2 THE COURT: Don't tell me how long they had your
3 requests.

4 MS. NURHUSSEIN: No. What I was going to point out is
5 that it is their obligation to produce their privilege log
6 along with their documents. They produced their privilege log,
7 as Mr. Evans pointed out in May.

8 THE COURT: We are now sitting here in July.

9 MS. NURHUSSEIN: We did raise this issue within a few
10 weeks of receiving the privilege log.

11 THE COURT: You raised it with me for the first time.
12 The answer is, of course, your letter at the end of June.

13 MS. NURHUSSEIN: Actually, June 15th, I believe.

14 THE COURT: Whenever your first letter came in. Yes,
15 June 15th is correct. I am not going to rule it untimely.
16 However, if you lose a few of these, I suggest you either give
17 up or I am, as I mentioned in the order setting forth this
18 conference -- no, some other order -- you may well wind up
19 paying on a per document basis, one side or the other.

20 Either this material is privileged or and you're
21 wasting my time or it's not privileged and the other party is
22 wasting my time. Hand me a sample document and we'll go from
23 there.

24 MR. EVANS: If I may, your Honor, the plaintiffs have
25 never raised with me that they believe these documents are not

1 privileged. They have simply contested the sufficiency of the
2 log. They were, I think, pretty clear on that at our last
3 call. But I have the documents with me. In light of your
4 order the last week, the plaintiffs and defendants both
5 identified documents within each category.

6 THE COURT: Let's start with the first one. Hand it
7 up. Let me ask Ms. Nurhussein, is that correct, that you are
8 not challenging whether these are privileged, you just think
9 their log wasn't sufficient?

10 MS. NURHUSSEIN: Your Honor, we don't have sufficient
11 information due to the deficiencies in the current log to
12 challenge their designation. The problem is they don't provide
13 any description of what documents. All the descriptions are
14 sort of generic email from such and such person to such and
15 such person. It is difficult for us to tell, just based on the
16 face of the document, whether it actually contained privileged
17 information.

18 MR. EVANS: If I may, your Honor, these are really a
19 series of documents, so one at a time is a little bit
20 misleading.

21 THE COURT: Hand me the series that you think are all
22 related, Ms. Nurhussein. I must say, considering that this
23 document went to Mr. Evans and Ms. Chavey, normally I don't
24 even require parties to --

25 MS. NURHUSSEIN: Your Honor, the first one I had on my

1 list was Publicis 000306.

2 MR. EVANS: It's document number 2 on the privilege
3 list.

4 MS. NURHUSSEIN: My log says email from M. Emmerich to
5 in-house counsel.

6 THE COURT: Let me get out which exhibit somebody's
7 letter was on the privilege log. Let's make sure we are all on
8 the same page. What I have just been handed has no Bates
9 numbers of any sort, so I have no idea what it is.

10 You're saying this is the Emmerich?

11 MR. EVANS: That is document 2, your Honor.

12 THE COURT: Why is it given to me with a further email
13 from somebody to you and Ms. Chavey?

14 MR. EVANS: The log should actually read in this
15 instance "to inside and outside counsel." What happened in
16 this case and the series of emails, as the plaintiffs surmised
17 and said in their letter, is that in order to avoid having to
18 collect electronic email accounts in light of the French
19 blocking laws, our client was particularly sensitive, they
20 forwarded us emails responsive to requests for information,
21 most of which had to do with the salary hiring freeze.

22 So, the mails will reflect in some cases the back-and-
23 forth between in-house counsel or outside counsel and somebody
24 at the client, in other cases will simply be emails forwarding
25 information received as a result of those communications.

1 THE COURT: Putting aside the forwarding to you, which
2 really wasn't part of the original process but was just the way
3 of getting it produced, it appears to be from Emmerich, senior
4 VP and general secretary, to John Spitzig.

5 MR. EVANS: Yes, who is in-house counsel.

6 MR. WITTELS: I thought it said "to Bob et Rennee."

7 MR. EVANS: The subject is Bob et Rennee.

8 THE COURT: My question is, what is this all about?
9 Are you suggesting that I need to see the whole email chain to
10 better review it? It looks like several of these are similar.

11 MR. EVANS: Almost all of these are the same. We
12 produced every document after the email from Mr. Emmerich to
13 Mr. Spitzig. So the email chain that he forwarded has been
14 produced. What has not been produced in all of these cases
15 with respect to these emails are the forwarding of the email to
16 in-house or outside counsel.

17 THE COURT: That is, frankly, not relevant to
18 anything. Any further discussion from the plaintiffs?

19 MR. WITTELS: I guess the reason we brought this up,
20 your Honor, is because, again, all the privilege logs we have
21 seen --

22 THE COURT: I'm sorry to interrupt you. It sounds
23 like there was either the usual lack of communication or the
24 usual distrust of each other that's all too prevalent in this
25 case. Yes, the log might have been better, etc. You now

1 understand what this is, which is largely transmittal emails
2 from a nonsubstantive, from somebody at Publicis to a lawyer at
3 Publicis. Can we move on?

4 MR. WITTELS: Yes. I would ask, though, is it
5 regarding requesting legal advice, seeking legal advice?

6 THE COURT: It's a cover email. It is dear Joe,
7 attached is what you asked for. As I understand what Mr. Evans
8 just said, everything that was attached has been produced to
9 you, and they just didn't produce the internal legal
10 transmittal memo for fear that that was waiving some privilege.
11 It is what we call in the practice here a nonevent email.
12 Frankly, under 502 I don't know why you don't just show it to
13 them and be done with this. In any event, I'm not ordering it
14 to be produced.

15 Now the question is, having gone through one of these,
16 can I forgo all that are agreed to be similar to this? Or I'll
17 start reviewing them and one side or the other is paying
18 sanctions under Rule 37.

19 MR. WITTELS: Your Honor, maybe I just didn't
20 understand what Mr. Evans was saying. Your Honor certainly
21 articulated it so I do understand it. Can I understand that
22 that is the case, all of the documents that are cover letters
23 attached documents that have been already produced to
24 plaintiffs? Is that correct?

25 MR. EVANS: Yes, that is correct, insofar as there are

1 cover letters. There are some emails, and I can show you an
2 example if you like, which reflect the conversation between
3 inside counsel and the client regarding this case.

4 THE COURT: If Mr. Wittels wants me to review those, I
5 will. Are we done with what we are calling the cover memo
6 emails?

7 MR. WITTELS: Yes. Mr. Evans, just tell me what
8 number that goes to. Is it to 64? It's hard to tell.

9 MR. EVANS: That is, every email, every document up
10 through 62 before you get to an expense report, are either
11 cover emails or emails reflecting the investigation for
12 documents in the case.

13 THE COURT: Let me give this one back to you. Let's
14 move on to the first of your semi-substantive ones. Whoever
15 the person in the back of the room was, we have sufficiently
16 bored her that she is gone. What am I looking at here?

17 MR. EVANS: In response to request for information
18 reflecting travel by Publicis employees to New York, we
19 produced expense reports for all Publicis employees that
20 reflected travel to New York. In my opinion, the substance of
21 those emails themselves was irrelevant, but for nonattorneys we
22 just produced it to avoid any dispute.

23 For attorneys, <we redacted it and included it on the
24 log so that they would have a date or dates of the travel but
25 otherwise not potentially disclose any privileged information

1 reflected by the substance.

2 THE COURT: This is which document on the log you just
3 handed me?

4 MR. EVANS: The document you are looking at is
5 privilege log document 63 and is the expense forms related to
6 travel by Publicis Groupe general counsel Russell Kelly.

7 THE COURT: Was this not produced at all or was it
8 produced with redactions?

9 MR. EVANS: Simply as a block page that said
10 "Redacted." The purpose was to have the date on the log that
11 they would be able to have to reflect the travel.

12 THE COURT: All right. I also note the document is in
13 French. Certain words like "taxi" translate. Mr. Wittels?

14 MR. WITTELS: Your Honor, on this point, given again
15 not having a description, we believe the federal rules requires
16 you to at least tell the basis of what the topic is and who the
17 cc is sort of standard practice to list everyone.

18 THE COURT: It is an expense report. There is no
19 narrative on it except to the extent of itemizing expenses, and
20 in the course of that noting people that Mr. Kelly had meals or
21 some such with. Whether that is privileged or not, I don't
22 know. On the other hand, for your purposes who cares? Mr.
23 Kelly of Publicis came to New York.

24 MR. WITTELS: If Publicis lawyers are involved in
25 doing work --

1 THE COURT: Counsel, he is in New York. He is a
2 Publicis lawyer. You have that fact. I can, I guess, have
3 them produce the expense report up through the heading, which
4 shows that it's Kelly, it's Publicis. It's an expense report
5 dated in the European style December 18, 2008. OK? He came to
6 New York as shown on that expense report. What else do you
7 need?

8 MR. WITTELS: We would need what your Honor described
9 as well as when he came to New York and what the purpose of the
10 trip was.

11 THE COURT: That's not shown on here. Literally, it
12 says, "Hotel," such and such a date, "not in New York."
13 Another date not in New York. Third date, hotel New York City
14 and a charge for it. There are then charges for meals, taxi,
15 etc. Most of which by the dates had nothing to do with New
16 York, because this, for whatever reason, is his travel for
17 quite a long period of time.

18 MR. WITTELS: It's relevant, your Honor, to whether
19 Publicis --

20 THE COURT: What is relevant?

21 MR. WITTELS: The fact that Publicis attorneys are in
22 New York doing business.

23 THE COURT: Thanks. Stop. Produce this report with
24 the cover entry that I mentioned, the person's name and the
25 date of the report And the hotel date where it says "Hotel New

1 York City." That's it, period. Any problem with that, Mr.
2 Evans?

3 MR. EVANS: No, your Honor.

4 THE COURT: Good. Do that for all the other expense
5 reports that are on this list, which is another half dozen or
6 whatever.

7 Anything else you want, Mr. Wittels?

8 MR. WITTELS: Not from the privilege log. Thank you.

9 THE COURT: Let me again give this back to you, Mr.
10 Evans.

11 On the redaction logs, let me see one sample of the
12 redacted document and its corresponding unredacted version.
13 What am I looking at?

14 MR. EVANS: These are travel expense records like the
15 ones we just looked at for nonattorneys within Publicis Groupe
16 for travel to New York. We redacted out pages that reflected
17 travel not to New York and left in everything else that related
18 to New York.

19 THE COURT: What is the objection? Do you really want
20 to know that somebody was in Chicago or Seattle or whatever,
21 which has nothing to do with New York? Remember, this is doing
22 business in New York, not a securities case or the like where
23 doing business anywhere on the continental U.S. applies.

24 MS. NURHUSSEIN: Yes, your Honor, I understand. The
25 issue that we have with the redaction log is that defendants

1 have unilaterally determined that the this information is not
2 relevant. We do concede that the information that you just
3 referred to, we wouldn't push for information --

4 THE COURT: Is there a reason the two of you don't
5 talk to each other?

6 MS. NURHUSSEIN: Your Honor, the problem is the log.
7 Again, this goes back to deficiencies in the redaction log.
8 The log says, "Contains nonresponsive information,"
9 semicolon --

10 THE COURT: I renew my question. You have just heard
11 what Mr. Evans said. Is there a reason, and I don't know whose
12 fault it is, but you're all taking my time because the two of
13 you won't talk to each other. I don't know whose fault it is
14 and frankly I don't care. You have now heard what has been
15 redacted and why. Regardless of how bad their redaction list
16 is, this isn't kindergarten. This isn't a law school exam
17 where I give their redaction log a grade.

18 This is you're asking me for a ruling. Having heard
19 that they redacted non-New York travel, is there any objection
20 to that? Yes or no.

21 MS. NURHUSSEIN: No, your Honor, there is no objection
22 to that. I would ask defense counsel whether that's the only
23 basis for all the redactions in all of these expense reports,
24 whether the only reason for the redactions is because it
25 relates to non-New York travel.

1 MR. EVANS: That's correct. As it says in our
2 privilege log, reflect travel to location to other than New
3 York.

4 MS. NURHUSSEIN: The redaction log gave a different
5 impression to me on that.

6 THE COURT: If you had spoken, you might have figured
7 this out. I'm returning the redaction material.

8 MS. NURHUSSEIN: Your Honor, just for the record, we
9 did confer with defense counsel. I don't recall that --

10 THE COURT: All I can tell you is neither of you are
11 helping the progress of this case. There is enough serious
12 substantive issues to be dealt with that when you can't figure
13 out the reason for redaction, which is so crystal clear if you
14 spoke to each other, something is wrong.

15 Are there any other issues as to jurisdictional
16 discovery other than me setting a deadline for its completion
17 at this point?

18 MR. EVANS: There is one other document, your Honor.
19 It actually is a one-page document. I handed you three pages.
20 That is the unredacted version coming up now. This is a
21 document that was also redacted for relevance. It is the group
22 structure chart that was produced to plaintiffs. We redacted
23 those with ownership interests in Publicis Groupe itself but
24 left any information that contained information regarding
25 Publicis's relationship with the subsidiaries or entities

1 listed on here.

2 THE COURT: What is the objection?

3 MS. NURHUSSEIN: Your Honor, I guess it is two things.
4 The point that relates specifically to this document is that we
5 believe we are entitled to see the overall corporate structure
6 and the interrelationship among all the entities.

7 THE COURT: Why are you entitled to anything above
8 Publicis? You're trying to prove that Publicis Groupe is doing
9 business in New York. If Sherlock Holmes and Mr. Moriarty own
10 shares in Publicis Groupe and they are not in New York, what
11 difference does it make?

12 MS. NURHUSSEIN: Your Honor, we can let this one go in
13 the interests of resolving this.

14 THE COURT: Thank you. Good. The documents are going
15 back to Mr. Evans. Any other issues from the plaintiff or the
16 defendant before we set a deadline to complete the
17 jurisdictional discovery?

18 MR. EVANS: No, your Honor.

19 MS. NURHUSSEIN: Your Honor, the last issue we wanted
20 to raise is that your Honor granted us leave to serve two
21 additional requests on defendant MSL. We had served those. In
22 response to one related to Publicis policies that are imposed
23 on MSL and the other relating to Publicis' involvement in
24 client pitches and other client matters, there were a couple of
25 documents in response to the first request, no documents in

1 response to the second.

2 We did confer with defense counsel, counsel for MSL.
3 Our question was really, given the informational asymmetry,
4 what kind of search they conducted for documents, granted given
5 that they were apparently unable to uncover any responsive
6 document.

7 THE COURT: Do your clients who were employees of MSL
8 know of any Publicis involvement or Publicis documents that
9 weren't produced that either would prove to me that Mr. Brecher
10 and his colleagues didn't do a good job or --

11 MS. NURHUSSEIN: Your Honor, we do know of extensive
12 Publicis involvement in client pitches. It's just a question
13 as to whether, in addition to the sort of emails that we have
14 seen as part of our review and a couple of individual client
15 pitches that we saw as part of that review process, whether
16 there is anything else. Again, today, they are the ones who
17 have most of the information and would be in a better position
18 to identify responsive documents.

19 THE COURT: I understand. But this is a common
20 problem that lawyers for whatever reason don't like to talk to
21 their clients. Your clients worked there for umpteen years.
22 If there is a smoking gun or even not a smoking gun, you would
23 think your clients would know about it and would tell you about
24 it.

25 Any response from MSL, Mr. Brecher?

1 MR. BRECHER: Thank you, your Honor. First, I wasn't
2 aware that this was going to be an issue today, since, as you
3 previously ruled, if they were going to bring up something,
4 they needed to bring it to your attention at least two days
5 beforehand to avoid the problem of one side not being aware
6 that an issue was going to be raised.

7 Putting that aside for the moment, we did have a
8 meet-and-confer, Ms. Chavey and I, with Mr. Wittels and Ms.
9 Nurhussein. We stated that we conducted a reasonable inquiry
10 based on the request that was made but that they should refer
11 to our objections as well. You had ordered previously that we
12 produce policy documents, not every single email on the
13 implementation. That's what we tried to accomplish.

14 MS. NURHUSSEIN: I simply ask defense counsel if they
15 can indicate what sort of search they conducted. Because we
16 don't have access to the same information that defendants have,
17 we would at a minimum ask that they indicate what sort of
18 sources they searched, just so we can also be in a position to
19 assess whether they conducted a diligent search.

20 MR. BRECHER: Your Honor, this issue was raised before
21 the Court maybe two months ago, when they again said they want
22 to know exactly what we did. We explained to the Court we are
23 not required to tell them every step we took and who we spoke
24 with. We are supposed to make a reasonable, diligent effort,
25 and we have made that representation.

1 We are not obligated, unless the Court requires us to
2 do so, to disclose our work product and how we responded. They
3 haven't disclosed every individual plaintiff they spoke with
4 and what documents they looked at and what drawers they looked
5 in at their homes and which computers. We haven't asked them
6 to do so. They have said they have produced all documents in a
7 reasonable, diligent fashion, and we have taken their word for
8 it. That's my response to that, your Honor, which we have
9 already addressed, by the way.

10 THE COURT: At this point we are going to move on.
11 How soon can Publicis produce whatever is left to be produced?
12 It had better be a date with July in it.

13 MR. EVANS: Your Honor, the only documents left to be
14 produced are from the email accounts of the two individuals I
15 mentioned earlier and documents related to one stock share
16 program that I can produce this week. The emails, there were
17 four corrupted files when they were sent to our vendor, so I
18 don't know the extent of those files.

19 Of those that I have, there were 350,000 emails -- I'm
20 sorry -- 500,000 emails in the set. Restricting it to
21 communications between MSLGroup and Publicis Groupe, we should
22 be able to review and produce responsive documents from those
23 that I have in two weeks.

24 THE COURT: That is July 23. Do whatever you need to
25 do about the corrupted files. Is the corruption likely to be

1 in the originals or in the transportation, for lack of a better
2 word, from France to you and you to your vendor?

3 MR. EVANS: We believe it is the latter. We are
4 having them sent on visible media, and we hope that will solve
5 the problem.

6 THE COURT: Make sure you're using FedEx and other
7 things to speed.

8 MR. EVANS: Surely.

9 THE COURT: July 30 is the end of this discovery,
10 hopefully sooner. Therefore, plaintiffs opp. brief is due no
11 later than August 13. Assuming that the last thing is either
12 the July 23 production of the emails or the Re:Sources
13 disposition, if all of that gets done sooner, that will
14 advance, namely, make earlier, your opposition papers. So, no
15 later than August 13.

16 If there are any problems, I expect to know about it
17 long before July 30 because I'm not going to be inclined to
18 hold the briefing any further. I assume that on the emails you
19 will do a rolling production once your vendor gets through it
20 so it can be done sooner than July 23, other than perhaps the
21 corrupted material.

22 MR. EVANS: Yes, your Honor.

23 THE COURT: Good. When do you all want to come back?
24 If all this goes according to plan, there may not be anything
25 for us to do, since the MSL-oriented discovery is on hold until

1 after people opt in or don't opt in. That's probably going to
2 take a while. Shall we leave it without a scheduled conference
3 date?

4 MR. WITTELS: That probably makes the most sense, your
5 Honor.

6 MR. EVANS: I agree, your Honor.

7 MR. BRECHER: I agree.

8 THE COURT: The usual drill. I think MSL can get a
9 free pass on this transcript and piggyback off of Publicis.
10 But Publicis and plaintiff will share the cost of the
11 transcript 50-50.

12 The usual drill. If you're filing objections, 14 days
13 starts running today. Make your arrangements with the court
14 reporter. We are adjourned.

15 (Adjourned)